

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MAURICE LALLEMAND,  
Plaintiff,  
v.  
COUNTY OF LOS ANGELES, et al.,  
Defendants.

Case No. CV 17-0781 JAK (SSx)  
**MEMORANDUM DECISION AND ORDER  
DENYING DEFENDANTS' EX PARTE  
APPLICATION FOR ORDER  
COMPELLING PRODUCTION OF  
LIMITED PERSONNEL RECORDS  
PURSUANT TO PROTECTIVE ORDER**  
[Dkt. No. 109]

On June 7, 2008, Defendants County of Los Angeles, Jim McDonnell, Ungrey Holifield, Tawnia Rojas, Ernesto Valencia, Andrew Hagewood, Matthew Vanderhorck and Allen Castellano collectively filed an "Ex Parte Application for an Order Compelling Production of Limited Personnel Records Subject to Protective Order, or, Alternatively, for an Order Shortening Time to Hear Defendants' Motion to Compel Production of Documents," ("Ex Parte Application" or "Ex Parte Appl."), including the declaration of Marvin C. Cho ("Cho Decl."). (Dkt. No. 109). Defendants seek an Order compelling production of Plaintiff Maurice Lallemand's personnel file kept by his employer, the Los Angeles County District Attorney Bureau of Investigation ("LACDA-BOI").

1 On June 11, 2018, Plaintiff filed an Opposition to the Ex  
2 Parte Application, ("P Opp."), supported by the declaration of Olu  
3 K. Orange ("Orange Decl."). (Dkt. No. 111). That same day, third  
4 parties Los Angeles County District Attorney's Office, LACDA-BOI  
5 Sgt. Jose Cisneros and former LACDA-BOI Investigator Mark Felix  
6 (collectively, the "DA") filed the "Declaration of Raymond J.  
7 Fuentes in Opposition to Ex Parte Application." ("Fuentes Decl.,"  
8 Dkt. No. 112).

10 On June 12, 2018, the Court held a telephonic hearing.  
11 Following the hearing, pursuant to the Court's instruction, the DA  
12 filed a "Supplemental Declaration of Raymond J. Fuentes in  
13 Opposition to Ex Parte Application." ("Fuentes Supp. Decl.," Dkt.  
14 No. 113). On June 13, 2018, the DA filed an "Amended Supplemental  
15 Declaration of Raymond J. Fuentes in Opposition to Ex Parte  
16 Application." ("Fuentes Am. Supp. Decl.," Dkt. No. 115). For the  
17 reasons stated below and on the record at the hearing, the Ex Parte  
18 Application is DENIED.

II.

## BACKGROUND FACTS

23 Plaintiff is a Senior Investigator at LACDA-BOI.  
24 ("Complaint," Dkt. No. 1, ¶ 19). Plaintiff alleges in this action  
25 that certain Los Angeles County Sheriff's Department ("LASD")  
26 Deputies "ignored his status as a peace officer," (id. ¶ 25), and  
27 "wrongfully and unlawfully assaulted, battered, detained, searched  
28 and retaliated against [him] for attempting to perform his duties

1 and attempting to exercise his right to free speech." (Id. ¶ 22).  
 2 Plaintiff further alleges that Defendants conspired to "dissuade,  
 3 mislead and deny him the opportunity to file [a] complaint" with  
 4 the LASD about the incident. (Id. ¶ 29).

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6 On March 23, 2018, Defendants served the "Los Angeles County  
 7 District Attorney's Office" with a subpoena to produce materials  
 8 in Plaintiff's personnel file. (Cho Decl. ¶ 2 & Exh. A at 18-22).<sup>1</sup>  
 9 Defendants simultaneously served a deposition subpoena on Sgt.  
 10 Cisneros, Plaintiff's direct supervisor, which included the same  
 11 document request as that served on the District Attorney's Office.  
 12 (Id. ¶ 3 & Exh. A at 23-27). The subpoenas sought production of  
 13 "Any and all documents contained in Plaintiff Maurice Lallemand's  
 14 personnel file including, but not limited to, performance  
 15 evaluations, complaints made by and against Lallemand, and  
 16 disciplinary actions." (Id., Exh. A at 18, 23).<sup>2</sup>

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18 On April 26, 2018, Cho sent an email to Plaintiff's counsel,  
 19 Olu Orange, asking whether Plaintiff would agree to a proposed  
 20 stipulation to reopen discovery for the limited purposes of taking

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21 <sup>1</sup> In the absence of consecutive pagination, the Court will cite to  
 22 specific pages of Exhibits submitted by any party by the CM/ECF  
 23 page numbers on the Court's docket.

24 <sup>2</sup> On March 28 and 29, 2018, DA counsel Raymond J. Fuentes attempted  
 25 to correspond via email with Defendants' counsel Marvin C. Cho  
 26 regarding the need for a protective order and to inform Defendants'  
 27 of the DA's assertion of various privileges in opposition to the  
 28 subpoenas. (See Fuentes Supp. Decl., Exhs. 2-3). However, as  
 Fuentes admitted in his Amended Supplemental Declaration, those  
 March 2018 emails were sent to an incorrect address. (Fuentes Am.  
 Supp. Decl. ¶¶ 5-6). Cho represented at the hearing that he never  
 received the March 28 and 29 emails from Fuentes.

1 the depositions of Jose Cisneros and Mark Felix, and, separately,  
2 if Plaintiff would agree to enter into a protective order for the  
3 production of Plaintiff's personnel file. (Orange Decl., Exh. A  
4 at 1). Orange responded on April 30, 2018, stating that Plaintiff  
5 did not have any objections to the depositions of Cisneros and  
6 Felix, but would not agree to the production of Plaintiff's  
7 personnel file. (Id.). On May 3, 2018, the Parties filed a Joint  
8 Stipulation to reopen discovery solely for the purpose of taking  
9 the Cisneros and Felix depositions. (Dkt. No. 106). The District  
10 Judge granted the Stipulation on May 7, 2018 and ordered that those  
11 two depositions be taken by June 18, 2018. (Dkt. No. 108; see also  
12 Cho Decl. ¶ 5).

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14 On May 9, 2018, Cho forwarded a proposed stipulation for a  
15 protective order to Fuentes for his review and signature. (Fuentes  
16 Am. Supp. Decl. Exh. 5 at 9-10). On May 12, 2018, Fuentes sent an  
17 email to Cho in which he stated that Plaintiff had contacted the  
18 District Attorney's Office to object to the production of his  
19 personnel file, and that Fuentes' office had spoken to Plaintiff's  
20 attorney, Orange, who likewise objected to the production of the  
21 personnel file and refused to sign the stipulation for protective  
22 order to prepare for the production. (Cho Decl. ¶ 7; see also  
23 Fuentes Am. Supp. Decl. Exh. 5 at 9). Fuentes further stated that  
24 in light of Plaintiff's objections, the District Attorney's Office  
25 was "obligated to object to the production of Mr. Lallemand's  
26 personnel file." (Id.).

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1       On May 15, 2018, Cho sent Fuentes and Orange a meet and confer  
2 letter regarding the production of Plaintiff's personnel file.  
3 (Cho Decl., Exh. A at 41-43). In the letter, Cho agreed to narrow  
4 the document requests, and notified the parties that if they did  
5 not agree to the production, Defendants would file an Ex Parte  
6 Application for an order compelling production of the file. (Id.  
7 at 43). On May 16, 2018, Fuentes sent an email to Cho explaining  
8 that Plaintiff and his attorney objected to the production of  
9 Plaintiff's personnel file on the grounds that the information was  
10 privileged and confidential and the subpoena was overbroad.  
11 (Fuentes Am. Supp. Decl., Exh. 7 at 35). Fuentes further explained  
12 that the proposed deponent, Sgt. Cisneros, "does not have control,  
13 dominion and/or access to Mr. Lallemand's Personnel File; and, as  
14 such, is not in a position to produce Mr. Lallemand's Personnel  
15 File." (Id.). Accordingly, Fuentes stated that Cisneros "will  
16 object to any Motion to Compel the Personnel File." (Id.).  
17

18       On May 29, 2018, Cho delivered Defendants' portion of a Joint  
19 Stipulation to Fuentes. (Cho Decl. ¶ 11 & Exh. A at 1-14). Fuentes  
20 sent an email to Cho on May 30, 2018 summarizing the objections of  
21 the District Attorney's Office and Sgt. Cisneros to the subpoenas  
22 on the grounds of (1) various privileges, (2) Plaintiff's personal  
23 objections to the production of his file, (3) the need for a court  
24 order in light of Plaintiff's objections to the production, and  
25 (4) Cisneros' lack of possession, custody or control over the  
26 requested materials. (Fuentes Decl. Exh. 1 at 5). In the email,  
27 Fuentes specifically asked Cho to advise the Court of his clients'  
28 objections to the Ex Parte Application and Motion to Compel. (Id.).

III.

## DISCUSSION

**A. Ex Parte Relief Is Not Warranted**

6       Ex parte applications are solely for extraordinary relief and  
7       should be used with discretion.    See Mission Power Eng'g Co. v.  
8       Cont'l Cas. Co., 883 F. Supp. 488 (C.D. Cal. 1995).   Evidence must  
9       show that the moving party's cause "will be irreparably prejudiced  
10      if the underlying motion is heard according to regular noticed  
11      motion procedures."    Id. at 492.   Moreover, the moving party must  
12      establish that it is "without fault in creating the crisis that  
13      requires ex parte relief, or that the crisis occurred as a result  
14      of excusable neglect."    Id.

16       Here, Defendants have failed to show irreparable prejudice or  
17       that they were without fault in creating the crisis requiring ex  
18       parte relief. At the hearing, Defendants were unable to identify  
19       any specific information in Plaintiff's personnel file that they  
20       anticipated would be relevant to their case. Instead, Defendants  
21       merely speculated that the file might contain such information.  
22       Accordingly, Defendants have not shown that they would be  
23       irreparably prejudiced if this dispute were heard on a regularly  
24       noticed motion.

26 Furthermore, Defendants were plainly responsible for the delay  
27 in pursuing this discovery and in seeking judicial relief. At the  
28 outset of this litigation, the District Judge plainly defined the

1 fact discovery cut-off as "the final day for completion of non-  
2 expert discovery, including resolution of all discovery motions."  
3 ("Order Setting Rule 16(b) (/26(f) Scheduling Conference," Dkt. No.  
4 45 at 3) (emphasis added).<sup>3</sup> Nonetheless, as further discussed in  
5 Part III.B below, Defendants waited until the end of the fact  
6 discovery period even to serve the subpoenas, without allowing a  
7 sufficient cushion of time to resolve any discovery disputes that  
8 might arise in connection with the subpoenas. Defendants were  
9 unable at the hearing on the ex parte to provide any persuasive  
10 justification for failing to seek the personnel file earlier in  
11 the case. Furthermore, once discovery was reopened for limited  
12 purposes, Defendants also delayed bringing this matter to the  
13 Court, even after being unequivocally put on notice that Plaintiff  
14 and the DA opposed the production of Plaintiff's personnel file.  
15 The Court is not persuaded that this Ex Parte Application could  
16 not have been brought as a regularly noticed motion, had Defendants  
17 proceeded with reasonable diligence. Accordingly, Defendants have  
18 failed to show an entitlement to ex parte relief.

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24 <sup>3</sup> Judge Kronstadt's form Consolidated Standing Orders for Civil  
25 Cases, available on the Court's website, likewise includes this  
26 definition of the discovery cut-off, and appears to be not only  
27 the source of the definition in the Order Setting Rule 16(b) (/26(f)  
Scheduling Conference, but also the currently operative version of  
the definition. (See <http://www.cacd.uscourts.gov/honorable-john-kronstadt>, "Consolidated Standing Orders for Civil Cases (Revised  
09-16-16)," at 40).

1       **B. Defendants Have Not Shown Good Cause To Warrant Relief From**  
 2       **The Scheduling Order**

3  
 4       Fact discovery closed in this matter on April 9, 2018. (See  
 5 Dkt. No. 100). On May 7, 2018, the District Judge reopened  
 6 discovery pursuant to the parties' stipulation "for the limited  
 7 purpose of taking the depositions of (1) Jose Cisneros and (2) Mark  
 8 Felix." (Dkt. No. 108). The parties' stipulation did not seek to  
 9 reopen discovery for the purpose of obtaining Plaintiff's personnel  
 10 file, and the District Judge's Order did not expressly grant such  
 11 permission. (See Dkt. Nos. 106, 108). Indeed, Defendants had  
 12 specifically inquired whether Plaintiff would agree to stipulate  
 13 to reopen discovery for the production of Plaintiff's personnel  
 14 file, and Plaintiff would not consent. (Orange Decl., Exh. A at  
 15 1). Accordingly, Plaintiff's personnel file was not included in  
 16 the Court's Order reopening discovery for limited purposes, and  
 17 Defendants' pursuit of the file after the April 9, 2018 cut-off  
 18 appears untimely.

19  
 20       The undersigned does not have the authority to alter the  
 21 scheduling order set by the District Judge. See Watts v. Allstate  
 22 Indemnity Co., 2012 WL 5289314, at \*2 (E.D. Cal. Oct. 23, 2012)  
 23 (magistrate judge does not have authority to amend district judge's  
 24 scheduling order or to hear untimely discovery disputes); UMG  
 25 Recordings, Inc. v. Disco Azteca Distrib., Inc., 2006 WL 2034689,  
 26 at \*3 (E.D. Cal. July 18, 2006) ("Of course, the magistrate judge  
 27 is not empowered to modify the district judge's scheduling  
 28 order."). Even if the Court had such authority, Defendants would

1 still need to show good cause for amendment of the scheduling  
2 order, which Defendants have not done here. As one court explained:  
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4 Rule 16 of the Federal Rules of Civil Procedure  
5 authorizes the court to enter pretrial scheduling  
6 orders, which set dates for the completion of discovery,  
7 the hearing of dispositive motions, trial, and other  
8 matters. Rule 16(b) provides that the "scheduling order  
9 shall not be modified except by leave of court and upon  
10 a showing of good cause." Fed. R. Civ. Proc. 16(b).  
11 Thus, when a plaintiff seeks to continue the dates set  
12 by the court at a scheduling conference, it must first  
13 show "good cause" for modification of the scheduling  
14 order under Rule 16(b). See Zivkovic v. Southern  
15 California Edison Co., 302 F.3d 1080, 1087 (9th Cir.  
16); Johnson v. Mammoth Recreations, Inc., 975 F.2d  
17 604, 608 (9th Cir. 1992).

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19 This "good cause" standard "primarily considers the  
20 diligence of the party seeking the amendment." Johnson,  
21 supra, 975 F.2d at 609. A party demonstrates good cause  
22 for the modification of a scheduling order by showing  
23 that, even with the exercise of due diligence, he or she  
24 was unable to meet the timetable set forth in the order.  
25 See Zivkovic, supra, 302 F.3d at 1087; Johnson, supra,  
26 975 F.2d at 609. "If the party seeking the modification  
27 'was not diligent, the inquiry should end' and the motion  
28 to modify should not be granted." Zivkovic, supra, 302

1 F.3d at 1087 (citation omitted). See also Johnson,  
2 supra, 975 F.2d at 609 ("Although the existence or degree  
3 of prejudice to the party opposing the modification  
4 might supply additional reasons to deny a motion, the  
5 focus of the inquiry is upon the moving party's reasons  
6 for seeking modification").

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8 Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha, 218 F.R.D.  
9 667, 671 (C.D. Cal. 2003).

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11 Defendants waited until the very end of the discovery period  
12 to serve subpoenas for the production of Plaintiff's personnel  
13 file. At the hearing on the Ex Parte Application, the Court  
14 specifically afforded Defendants an opportunity to explain why they  
15 had delayed serving the subpoenas, and counsel was unable to  
16 identify any persuasive reason why the discovery was not and could  
17 not have been propounded sooner. Defendants did not show that the  
18 relevance of the information they hoped to find in Plaintiff's  
19 personnel file became apparent only after Plaintiff had been  
20 deposed, for example. Indeed, requests for information included  
21 in law enforcement officers' personnel files are somewhat routine.  
22 If Defendants believe that Plaintiff's file may potentially contain  
23 helpful information, the need to pursue that information should  
24 have been discernable from the beginning of this litigation.  
25 Therefore, Defendants have not demonstrated the diligence that  
26 would ordinarily be required to amend a scheduling order to seek  
27 late discovery.

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1       C.    Defendants Have Not Shown That Cisneros Has Possession,  
 2       Custody Or Control Of The Documents Requested

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4        "The party to whom a subpoena for records is issued must  
 5 produce only those records which are in his 'possession, custody  
 6 or control.'" United States v. Int'l Union of Petroleum & Indus.  
 7 Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989) (quoting Fed.  
 8 R. Civ. P. 34(a) (footnote omitted)). "Control is defined as the  
 9 legal right to obtain documents upon demand." Int'l Union, 870  
 10 F.2d at 1452. "The party seeking production of the documents . . .  
 11 bears the burden of proving that the opposing party has such  
 12 control." A mere "practical" ability to obtain the documents --  
 13 i.e., a supervisor may go into an employee's file -- is not  
 14 sufficient for Rule 45. See In re Citric Acid Litigation, 191 F.3d  
 15 1090, 1107-8 (9th Cir. 1999) (separate corporate entities, even  
 16 with the "practical" ability to obtain documents, lack legal  
 17 control and therefore cannot be compelled to produce); Thompson v.  
 18 Gonzales, 2016 WL 5404436 at \*2 (E.D. Cal. 2016) (correctional  
 19 officers have no duty to produce prison records that they have no  
 20 legal right to obtain).

21

22       Even if the Court were to construe the District Judge's Order  
 23 reopening discovery for the limited purpose of taking Cisneros'  
 24 deposition to include the production of documents requested in the  
 25 subpoena served on Cisneros, Defendants' Ex Parte Application would  
 26 still fail. Fuentes explicitly informed Cho that while Cisneros  
 27 "has information about the underlying incident," Cisneros "is not  
 28 the custodian of records for the District Attorney's Office," and

1 therefore does not have legal "control" over Plaintiff's personnel  
2 file. (Fuentes Decl., Exh. 1 at 5). It is Defendants' burden to  
3 show that Cisneros in fact has such control, which Defendants have  
4 failed to meet. This is an alternate and independently sufficient  
5 basis for denying the Ex Parte Application.

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7 **IV.**

8

**CONCLUSION**

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10 For the reasons stated above and at the hearing, Defendants'  
11 Ex Parte Application is DENIED.

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13 DATED: June 14, 2018

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/S/  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

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